Supreme Court, U.S.
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In The

Supreme Court of the United States

BURTON KAPLAN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petition for Writ of Certiorari

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QUESTIONS PRESENTED

1. Whether it violates the Due Process Clause of the Fifth Amendment and the Compulsory Process and Confrontation Clauses of the Sixth Amendment, as well as this Court's jurisprudence to deny a criminal defendant the right to advance a theory of defense where there exists both an evidentiary basis and a good faith belief in support of the theory of defense?

2. Whether it constitutes reversible error to admit into evidence under Rule 801(d)(2)(E) of the Federal Rules of Evidence statements by a declarant who is not shown to be a coconspirator with the defendant against whom the statements are admitted and where such statements are neither in the course nor in furtherance of any conspiracy?

3. Whether the doctrine of nonmutual collateral estoppel should be applied against the government in the context of a criminal sentencing under the Federal Sentencing Guidelines where the government had both a full and fair opportunity and the incentive to vigorously litigate the issue in a previous related case?

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, Thomas Galpine was the only other party before the trial court and the court of appeals in this case.

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Burton Kaplan respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The Summary Order of the court of appeals and the order denying rehearing (App., *infra*, 1-7) are unpublished; however, the Summary Order is reported at 1999 U.S. App. LEXIS 19611 (2d Cir., June 11, 1999).

STATEMENT OF JURISDICTION

The court of appeals entered its judgment on June 11, 1999 (App. 1-6) and denied rehearing on October 14, 1999 (App. 7). The jurisdiction of this Court is evoked under 28 U.S.C. Section 1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment V to the Constitution of the United States provides, in relevant part, "*** nor shall any person ***be deprived of life, liberty, or property without due process of law.***"

Amendment VI to the Constitution of the United States provides, in relevant part, "(I)n all criminal prosecutions, the accused shall enjoy the right *** to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor ****"

Rule 401 of the Federal Rules of Evidence provides:

> "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or

less probable than it would be without the evidence."

Rule 403 of the Federal Rules of Evidence provides:

> "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

Rule 801(d)(2)(E) provides:

> **(d) Statements which are not hearsay**. A statement is not hearsay if --...(2) **Admission by party–opponent.** The statement is offered against a party and is (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

STATEMENT OF THE CASE

A. Procedural History

On January 9, 1998, following a jury trial, Petitioner, Burton Kaplan, along with his co-defendant Thomas Galpine, was convicted of the following: 1) One count of conspiring to distribute and possessing marijuana with the intent to distribute in violation of 21 U.S.C. Sections 841(b)(1)(A) and 846; 2) One count of distributing and possessing marijuana with the intent to distribute in violation of 21 U.S.C. Section 841(a)(1)(b) and (1)(A); and 3) Two counts of filing false income tax returns in violation of 26 U.S.C. Section 7206(1). Mr. Kaplan was given the

extraordinary sentence of 324 months of incarceration on these marijuana-related charges. Mr. Kaplan is presently incarcerated. Mr. Kaplan timely filed a notice of appeal in the United States Court of Appeals for the Second Circuit. That court had jurisdiction to hear the appeal under 28 U.S.C. § 1291.

On direct appeal, his conviction was affirmed on all counts in a Summary Order. *United States v. Galpine*, 1999 U.S. App. LEXIS 19611 (2d Cir., June 11, 1999).

Mr. Kaplan's motion for re-hearing and suggestion or re-hearing *en banc* were denied on October 14, 1999. [See App. 7]. This Petition is being timely filed.

B. Facts material to the questions presented.

The following is a statement of those facts that are directly relevant to this Court's consideration of the questions presented. Additional facts are set forth under the relevant arguments:

> The government's purported theory of prosecution in this case was that from 1991 through September of 1992, Burton Kaplan and Thomas Galpine were partners in a marijuana distribution business. The government claimed that Messrs. Kaplan and Galpine imported marijuana from Mexico to Texas and then transported it to the New York area, mainly by tractor-trailer truck. [Tr. 343][1] The government claimed that the Petitioner and his partner then sold the marijuana to supposed "major customers" named Forgione, Puglisi, and Chilli. [Tr. 345-46].

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[1] References to the trial transcript are set forth as "Tr....".

The quality of the government's case was extraordinarily weak. It did not present a single one of these "major customers" as witnesses; rather, it relied entirely on a cast of characters who can most charitably be characterized as re-tread, recycled deviants with lengthy criminal backgrounds, not worthy of belief under any circumstances. The government's witnesses claimed to be "associates" of the purported actual customers. Three of the four main witnesses (August, Molini, and Lenehan) were two bit hoods not worthy of belief. Their testimony consisted mostly of claims as to what the "customers" supposedly had told them years earlier about Mr. Kaplan and the alleged conspiracy. The fourth (Monica Galpine) was the scorned ex-wife of co-defendant Galpine who was out to get him at any cost.

A second remarkable and glaring weakness in the government's case was the absolute absence of a single video or audiotape confirming even a single drug transaction involving Mr. Kaplan. Indeed, this void is even more striking on the particular facts of this case. Mr. Kaplan's warehouse, from the which the government claimed that he conducted his marijuana transactions, was actually under strict surveillance by video tape during the very period of time alleged in the indictment (by local officials suspecting counterfeit clothing sales from the warehouse). What the videotaped surveillance revealed was exclusively that which Mr. Kaplan not only admitted at trial, but put forward as his defense to the government's outrageous and unsupportable claims of marijuana trafficking. Mr. Kaplan was, quite simply, in the business of selling counterfeit designer clothing, which he sold rather openly and quite successfully in large quantities from his very warehouse for many years. The warehouse was the site of his legitimate clothing business as well and all of the videotapes taken through this extended period of time confirmed solely that Mr. Kaplan was in the business of selling clothing in large quantities. [Tr. 1122-23; 1139; 1142; 1160-61; 1199; 1204; 1213-14; 1220-21].

No government witness or lawyer ever offered a reasonable explanation as to how it possibly could have been that Mr. Kaplan allegedly obtained and distributed nearly 50,000 pounds of marijuana through this very warehouse; yet not even a single marijuana seed was recovered during any search of the warehouse. There were more troubling questions raised by this prosecution which have never been answered and which directly undercut the integrity and legitimacy of the prosecution.

Among the most troubling facts underlying this prosecution which never has been explained by the government is the fact that all of the circumstances of the purported marijuana ring in which Forgione, Puglisi, and Chilli were involved were known to the government at least five years before Mr. Kaplan was prosecuted in this case. Forgione, Puglisi and Chilli were indicted back in 1992 and the government's main witnesses were working with the government back then. How can it possibly be that if Mr. Kaplan were such an important player in that scheme, that he was not even indicted in the case?[2] Indeed, the government's primary witness in the instant case, Robert Molini, implicated at least 22 alleged drug dealers during his initial DEA debriefing; yet Mr. Molini did not even so much as mention Mr. Kaplan's name. [Tr. 1524-25; 2474]. Years later, in an effort to make a case against Mr. Kaplan, the government decided to bring Molini, an admitted murderer, drug pusher, thief, gun runner, kidnapper, con man, counterfeiter, perjurer and parole violator, out from under his rock to provide the key testimony against Mr. Kaplan. But there was a lot more to Molini yet to be revealed.

Burton Kaplan never met or saw Robert Molini in his life. Mr. Kaplan had a clear theory about both Molini's motivation for lying and his opportunity for ascertaining facts about Mr. Kaplan that would enable him to testify convincingly. Molini, it turned out, was housed in a prison

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[2] Forgione, Puglisi and Chilli went to trial. The latter two were convicted; Mr. Forgione was acquitted.

with a notorious underworld figure, Anthony Casso, with whom Mr. Kaplan was well acquainted from his counterfeit clothing business. Casso was at the heart of this prosecution, as will be explained in a later section of this Petition; but suffice it to say here that Mr. Kaplan was stymied by the trial court even in his attempt to expose to the jury Molini's motive and opportunity for his completely fabricated testimony. [Tr. 1439-41] There were remarkable circumstances surrounding each witnesses' testimony, including the admitted perjury of an FBI agent in an attempt to bolster one of the informants. To the extent the facts surrounding these incidents relate to the issues raised herein, they will be discussed in some detail in the relevant sections.

The obvious question arising from all of this, of course, was why would the government target Burton Kaplan and fabricate a case against him. The defense theory provided a very simple, direct, and supportable theory to answer that very question; yet the trial court judge denied Mr. Kaplan the opportunity to put forward his defense theory either through direct evidence, cross-examination, or in any other way presenting the theory to the jury for its consideration. Accordingly, without a cogent theory of defense to explain the defense's accusations that each witness was lying and that the case was a fabrication from start to finish, it is not surprising that Mr. Kaplan was convicted. No juror intuitively would believe that a random person was targeted by the government and that the government then went to great efforts to accumulate witnesses to fabricate testimony unless some reason for such a proposition was provided. By denying Mr. Kaplan that opportunity, notwithstanding both the evidence to support such a theory and the good faith belief presented in connection with that theory, and by improperly admitting other evidence against him, the trial judge effectively secured his conviction.

REASONS FOR GRANTING THE WRIT

I. THE PETITION SHOULD BE GRANTED BECAUSE THE OPINION BELOW CONFLICTS WITH THIS COURT'S JURISPRUDENCE ON A CRIMINAL DEFENDANT'S RIGHTS UNDER THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT AND THE COMPULSORY PROCESS AND CONFRONTATION CLAUSES OF THE SIXTH AMENDMENT TO PRESENT A COMPLETE THEORY OF DEFENSE WHERE THERE IS EVIDENTIARY SUPPORT AND A GOOD FAITH BELIEF IN THE DEFENSE THEORY AND IMPORTANT CONSTITUTIONAL ISSUES WERE WRONGLY DECIDED

Burton Kaplan has at all times vehemently and consistently professed his complete innocence of all of the charges for which he was tried and convicted. At first he could only search for a reason that the government would go to such lengths to single him out and to fabricate a case against him. As discovery progressed, he had his answer.

Mr. Kaplan's primary intended theory of defense against these charges was that the entire case the government built against him was fabricated for one reason. [A216-18; 232, Tr. 6] Some years earlier, the government had arrested and indicted a major organized crime figure named Anthony Casso. Casso had agreed to become an informant for the government and had provided information and testimony for the government in a number of major cases. He was a prize "asset." It turned out, however, that the government needed someone to bolster or substitute for Casso, both as a source of information and as a witness. [A216; 232; Tr. 6] As noted, Mr. Kaplan had, for many years, run a very lucrative clothing business from his warehouse, dealing in both

legitimate and counterfeit clothing. To his great regret, among his long-time customers were a number of organized crime figures, the most notorious of whom was Anthony Casso. Mr. Kaplan had established a close business and personal relationship with Casso through their clothing deals and Casso had confided in him with some of his deepest secrets over the years. During his de-briefings with the government, Casso had revealed both his relationship with Kaplan and that the nature of the relationship including taking Kaplan into such confidences.

Needing corroboration for Casso, the government now decided that it would build a serious case against Kaplan for the express purpose of convincing him to become an informant and to serve in that capacity in addition to Casso or in his stead. Mr. Kaplan was not interested in the government's advances along these lines and so the case against him was built through completely fabricated testimony from re-tread government witnesses who had plenty of opportunity to get their stories together, who had incredible backgrounds filled with virtually every crime recognized in the federal criminal code, and who, in truth, had never even met Burton Kaplan, let alone engaged with him in any of the claimed activity.

It was this defense theory regarding the government's motive in fabricating the case against Mr. Kaplan which Mr. Kaplan tried desperately to put forward through his lawyer's arguments to the jury, through cross-examination, through the submission of documentary evidence and testimony on his own direct case, and through jury instructions and closing argument. The trial judge rejected each of these attempts, making it perfectly clear with a blanket ruling that she would not permit this defense theory to be put forward in any way, shape, or manner.[3]

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[3] The trial judge prohibited, with an *in limine* ruling, any mention of Casso or the government's desire to pressure Kaplan to cooperate on grounds of Federal Rules of Evidence 401 and 403. [A322; Tr. 5-8]

The record reflects both Mr. Kaplan's good faith and reasonable belief in this theory of defense (and his lawyer's as well) and independent objective support for it. That support came from a number of sources, both direct and inferential.

First, in discovery, two internal memoranda were produced at the Court's order, which finally explained the government's agenda in fabricating and pursuing this case. It was plainly and simply to pressure Mr. Kaplan to bolster Casso or to serve in his stead.[4]

Finally, all of the strange developments began to make sense. How was it that a primary government witness (Molini), a man whom Kaplan had never in his life met, knew so much about Kaplan and "voluntarily" came forward to testify against him in detail. It turned out that this was not just a bizarre occurrence or some random inexplicable matter of chance. Molini, the defense learned, had been incarcerated with Anthony Casso and had learned all about Mr. Kaplan during their talk among informants in prison. Indeed, Molini and Casso were both implicated in additional criminal conduct together while sharing their prison time with each other.

The government's agenda and the Molini/Casso relationship also explained why it was that the government was now accusing Kaplan of such a major role in a case that was indicted and tried some five years earlier. Indeed, in that earlier case against Forgione, Puglisi, and Chilli, who the government now claimed were supplied with their marijuana by none other than Burton Kaplan, Kaplan was never included as either a defendant or a witness; nor was his name even mentioned by Molini among the list of 22 alleged drug criminals who he professed to know in his debriefings.

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[4] The memoranda reflected the government's clear agenda to pressure Kaplan with a marijuana case to get him to "flip" or to "elicit his cooperation" to corroborate Casso in a "stalled investigation." [A110; 112-13; 212] One of the memos was even quoted in an article on the subject appearing in the New York Daily News on May 6, 1997.

Molini was available to the government during the first trial and Mr. Kaplan was readily available for indictment if the government really had believed he was the supplier of marijuana in that case.

In truth, Mr. Kaplan's bad fortune was that he did know some of those defendants, again, from his counterfeit clothing business and some of them had visited his warehouse to buy the clothing from him; so that case proved to be the perfect vehicle for the government's agenda. They had only to substitute marijuana for clothing, add a few very willing recycled witnesses with no connection whatsoever to each other or to Mr. Kaplan, and the mix was ready. Whether or not the trial court believed this to be the government's agenda in the case, Mr. Kaplan absolutely was entitled to put forward this complete defense through every evidentiary and procedural means available; yet each such attempt was denied; so that in the end, the jury was left with a group of horrible, unbelievable witnesses, but no theory the jurors could point to as to why, if the allegations were not true, the government had singled out Burton Kaplan.

Without any reason or any answer to that logical question, they had little choice but to convict, even on this weak record. The tragedy of the case is that Mr. Kaplan, now well into his sixties, faces the rest of his life in prison for a crime he did not commit. He had a complete defense theory that would have answered the jury's logical question, that was supported by his reasonable good faith belief, and by independent evidence, and that, in all likelihood would have rightfully set him free. Instead, in the present posture, the government has been permitted to perpetrate a heinous injustice and unless Mr. Kaplan obtains the relief he seeks, it is unlikely the truth will ever out and he will spend the rest of his life in prison.

A criminal defendant's constitutionally protected right to put his complete theory of defense before the jury is among the most fundamental of constitutional rights guaranteed to him. *Crane v. Kentucky,* 476 U.S. 683, 690

(1986). This Court has called this right one of the "minimum essentials of a fair trial." *Chambers v. Mississippi*, 410 U.S. 284, 294 (1973). The right finds its roots in the Fifth Amendment's Due Process Clause, *Id.*, as well as in the Sixth Amendment's Compulsory Process and Confrontation Clauses. *See, Crane, supra.; Washington v. Texas*, 388 U.S. 14, 23 (1967); *Davis v. Alaska*, 415 U.S. 308 (1974). The right to present a complete defense is an "essential component of procedural fairness" and it means at least providing "a meaningful opportunity [for the defendant] to be heard. *Crane, supra., citing, California v. Trombetta*, 467 U.S. 479, 485 (1984); *Strickland v. Washington*, 466 U.S. 668, 684-85 (1984); *In re Oliver*, 333 U.S. 257, 273 (1948); and *Grannis v. Ordean*, 234 U.S. 385, 394 (1914).

The right of an accused in a criminal trial to due process is, in essence, "the right to a fair opportunity to defend against the State's accusations." The rights to confront and cross-examine witnesses and to call witnesses in one's own behalf have long been recognized as essential to due process. *Chambers,* 410 U.S. at 294. These are the bare minimal rights that must be accorded to every criminal defendant. *Id.* The right of cross-examination is "more than a desirable rule of trial procedure." "It is implicit in the right of confrontation, and helps assure the 'accuracy of the truth-determining process.'" *Id.* (citations omitted). In short, the right to confront witnesses through cross-examination, which must be permitted to include questions designed to advance the defense theory, is "an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal." Denial of this basic right or "its significant diminution" "calls into question the ultimate 'integrity of the fact-finding process...." *Id.* (citations omitted). *See also, Davis v. Alaska*, 415 U.S. 308, 315 (1974). In the instant case, this right of confrontation with respect to questions designed to expose the government's hidden agenda and the witnesses' motivation for lying was denied on each attempt.

"The main and essential purpose of confrontation is to secure for the opponent the opportunity of cross-examination. The opponent demands confrontation, not for the idle purpose of gazing upon the witness, or of being gazed upon by him, but for the purpose of cross-examination, which cannot be had except by the direct and personal putting of questions and obtaining immediate answers." *Davis v. Alaska*, 415 U.S. 308, 315-16 (1974). "Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested." *Id.* The right of confrontation must include the right to challenge the witness's story directly, as well as to do so inferentially by discrediting the witness, based upon prior criminal convictions, possible biases, prejudices, "or ulterior motives of the witness as they may relate directly to issues or personalities in the case at hand. The partiality of a witness is subject to exploration at trial, and '**is always relevant as discrediting the witness and affecting the weight of his testimony.**'" *Davis v. Alaska*, 415 U.S. at 316. (emphasis added). This Court long has recognized that "the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination." *Id., quoting from, Greene v. McElroy*, 360 U.S. 474, 496 (1959). Constitutional protection of the right of cross-examination along these lines is the formalization or effectuation of the protection reflected in the "immutable" principles this Court has formulated that ensure the right of a defendant to know about and expose the quality of the government's case against the accused – and this is especially important when the case is built on the testimony of people who might be "perjurers or persons motivated by malice, vindictiveness, ... "[bias, or self preservation of advancement.]" *Davis*, 415 U.S. at 317.

Confronting the witness in cross-examination with facts designed to expose both the falsity of his story and his opportunity and motive to falsify are critically important means of putting the defense theory before the jury. Clearly,

as a matter of constitutional law, the jury is entitled to have the defense theory so put before it to be able to make an "informed judgment" about the credibility of key witnesses, the weight to give to their accounts, and their possible motives in testifying as they did. This meant, per force, permitting Mr. Kaplan to "expose to the jury the facts from which the jurors, as the sole triers of facts and credibility, could appropriately draw inferences relating to the credibility of the witness[es]." *Id.* He was denied this right and this constituted "constitutional error of the first magnitude" which "no amount of showing or want of prejudice" could cure. *Id., quoting, Brookhart v. Janis*, 384 U.S. 1, 3 (1966); *Smith v. Illinois*, 390 U.S. 129, 131 (1968). This Court in *Davis*, and elsewhere, has made it abundantly clear that, while the scope of cross-examination is subject to some discretion residing in the trial court judge, the right itself is paramount and supersedes a whole host of other important interests. Clearly in the circumstances of this case, the trial judge erred in completely disallowing multiple lines of cross-examination designed expressly to put forward the defense theory in the only way available to the Mr. Kaplan, based upon the concerns she identified under Rule 403 of the Federal Rules of Evidence. *See e.g., United States v. Blum*, 62 F.3d 63, 67-68 (2d Cir. 1995)(reversing conviction based on trial court's refusal to allow defense theory to be put forward due to Rule 403 concerns); *United States v. Flaherty*, 76 F.3d 967, 974-75 (8th Cir. 1996)(Gibson, J., dissenting).[5]

There are several critically important stages during the criminal trial at which the defendant with a defense theory to put forward, must advance his. These include opening and closing argument, cross-examination of the government's witnesses, his direct case, and in the jury

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[5] This included questions directed to the government's agenda and specific lines of cross designed to show, for example, Molini's motive and ability to fabricate, based on his association in prison with Casso.

instructions, *United States v. Allen*, 127 F.3d 260 (2d Cir. 1997)(reversing conviction for failing to permit jury instruction which reflected defense theory); *United States v. Abcasis*. 45 F.3d 39, 42 (2d Cir. 1995), *citing Crane v. Kentucky*, 476 U.S. 683, 690 (1986)(accord); *Chambers*, 410 U.S. at 302("Few rights are more fundamental than that of an accused to present witnesses in his own defense.") That is why the trial court must ensure that the defendant has the opportunity to put forward his defense consistent with the conceptually distinct rights to due process, compulsory process, and confrontation. The criminal defendant faces a number of crucial junctures during a trial at which he must put forward his defense theory if he has one to put forward.

Based upon the trial judge's rulings at the outset of the case and reaffirmed throughout, Mr. Kaplan was wholly denied any opportunity to put before the jury a complete theory of defense that would have provided answers for the jury as to why the government would go after him and fabricate a case. This could well have led to his acquittal. It may have been that the trial judge was not convinced by the theory; but that is not at all the test for whether the defendant is entitled to put forward the defense. There was both evidence and a reasonable good faith belief to support the defense and the judge's refusal to permit it in any form violated Mr. Kaplan's rights under the Fifth and Sixth Amendments and denied him a fair trial.

II. THE PETITION SHOULD BE GRANTED BECAUSE THE OPINION BELOW CONFLICTS WITH WELL ESTABLISHED AUTHORITY AGAINST THE ADMISSIBILITY OF STATEMENTS UNDER RULE 801(D)(2)(E) OF THE FEDERAL RULES OF EVIDENCE WHERE THERE IS NO PROOF THAT THE DECLARANT AND THE DEFENDANT AGAINST WHOM THE STATEMENTS ARE ADMITTED ARE COCONSPIRATORS AND WHERE THE STATEMENTS ARE MADE NEITHER IN THE COURSE NOR IN FURTHERANCE OF THE PURPORTED CONSPIRACY

The trial court admitted into evidence, over Mr. Kaplan's objection, statements from tape recordings made between its witness, Lenehan, and one Gerald Chilli under Rule 801(d)(2)(E) of the Federal Rules of Evidence.

Lenehan, like each of the other government witnesses in this case, seemed to be in a competition to see how many federal criminal statutes he could violate in as short a period of time as possible. His career included cocaine dealing, loan sharking, robberies, assaults, extortion, fraud, gambling, and attempted murder. [Tr. 1700-13]. In 1992, he found his true calling and, in an effort (a successful one) to avoid going to jail after yet one more arrest for attempted robbery, Lenehan "volunteered" to work as a government informant, secretly making cases against others, in exchange for his permanent freedom, at least $148,000 in tax free payments, and the free use of his own Lincoln Town car, all on the government's tab. [Tr. 1710; 1807-08; 1718; 1812; 1833]. His continued criminal conduct and cocaine and alcohol abuse were no obstacle in his relationship with the government [Tr. 1710-11; 1825]; neither was his admitted faulty memory of specific events [Tr. 1750; 1755]

Lenehan was used in this case as the only witness who claimed to have had actual personal experience with a drug transaction in which Mr. Kaplan purportedly was involved. His testimony, to the extent he inserted Mr. Kaplan in it, was a complete and unadulterated fabrication. In truth, he has never met or seen Mr. Kaplan in his life, except at the trial.

Lenehan testified that in the Summer of 1992, he worked as a driver for one Gerald Chilli. He was also working at that time as a government informant, unbeknownst to Chilli. [Tr. 1717-20]. Lenehan was trying to set Chilli up for the government; so he told him that he had a customer who wanted to buy some marijuana. Lenehan claimed that Chilli took him to Mr. Kaplan's clothing warehouse to find the marijuana (the same warehouse where not even a seed of marijuana was ever found). On the first occasion, Lenehan claimed that Chilli went inside the warehouse without him; but on the next occasion, he claimed to have actually gone himself. Once inside, Lenehan claimed that Chilli went off on a walk with an older man (supposedly Kaplan), while a younger man gave Lenehan (a man he had never met or seen before) a box that supposedly contained marijuana. Lenehan testified that he and Chilli

then left, took the box back to Chilli's, got two pounds of marijuana there and left. [Tr. 1718-20].[6]

The key to Lenehan's involvement in this trial was the admission, over defense objection, of certain tape recordings that he surreptitiously made in the car with Chilli before and after leaving Mr. Kaplan's warehouse. These tapes were erroneously admitted into evidence as coconspirators' statements under Rule 801(d)(2)(E) of the Federal Rules of Evidence. It was Lenehan's testimony "interpreting" the taped conversations that falsely implicated and hurt Mr. Kaplan.[7] Lenehan claimed that in the taped conversation of July 28, 1992, after they left Mr. Kaplan's

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[6] The government went so far as to have FBI Special Agent Pilker falsify a report and intentionally (and admittedly) commit perjury to attempt to corroborate Lenehan's false testimony. Agent Pilker testified after Lenehan and, at first, he attempted to corroborate all that Lenehan had sworn happened on the day in question. Pilker testified that he conducted physical surveillance of Lenehan and Chilli and that he had a typewritten report reflecting his observations. That report, and his independent recollection, corroborated that he had, indeed, seen Lenehan carrying a box (the purported box of marijuana) after leaving Mr. Kaplan's warehouse. [Tr. 1942]. When questioned further on cross-examination, however, Pilker begrudgingly admitted that his initial notes were made by hand and that he had transferred his handwritten notes to the typewritten report. When confronted with his handwritten notes, which indicated that he had seen Lenehan carrying only a plywood board that day and not a box, Pilker was forced to admit that he had falsified his surveillance report in order to make it conform to the statements to which he knew Lenehan would be testifying [Tr. 1947-48]. In a word, Pilker knowingly and intentionally committed perjury to attempt to bolster the government's fabricated case. There simply was never any box of marijuana in any way associated with Mr. Kaplan. - either coming from the warehouse or later from the car after their next stop at Chilli's.. [Tr. 1944-48] Pilker's perjury about the "box" proved the lie and proved how far the government was willing to go to get Burton Kaplan.

[7] It is well beyond peradventure that the tapes were the most damaging bit of evidence in this case, with the benefit of Lenehan's "interpretation;" for the jury specifically asked for them during its deliberations. [Tr. 2634-35].

warehouse on the first occasion, Chilli told him that marijuana from that warehouse would cost $1,350 per pound. Chilli also referred on the tape to a "righteous Jew" who had lent him $1,000 once. Lenehan claimed that this was a reference to Mr. Kaplan. [Tr. 301; 1732-33]. Lenehan further claimed that the tape made during his car ride with Chilli two days later (July 30, 1992) concerned the possibility of getting more marijuana from Kaplan some time in the future. [Tr. 302; 1742].[8]

The tapes (with the benefit of Lenehan's "testilying") were clearly the key piece of evidence against Mr. Kaplan, for they were the only bit of evidence that even came close to putting him in the proximity of a marijuana transaction. The admission of the tapes pursuant to Rule 801(d)(2)(E) was improper as a matter of law and the affirmance of their admission on that basis is in conflict with decisions from several other Circuit Courts of Appeal right on point.[9]

Rule 801(d)(2)(E) excludes from the definition of "hearsay" a "statement by a coconspirator of a party [made] during the course and in furtherance of the conspiracy."

Before a Court properly can admit a purported coconspirator's statement over a defendant's objection, the government must first satisfy the court that the statement "actually falls within the definition of the Rule." *Bourjaily*

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[8] In truth, Lenehan's "interpretation" of the tapes was a complete fabrication and was belied by the facts that before going to Kaplan's on July 28th, he and Chilli had met with a "Jew" named Arnold Rothman and had then gone back to Chilli's house where Lenehan actually got the marijuana from that he later delivered to the government. [Tr. 1757-59] Additionally, Lenehan further admitted that they actually were talking about "clothing" and not marijuana at all just before they arrived at Kaplan's warehouse {Tr. 1766] - a reference to Kaplan's actual business in both legitimate and counterfeit clothing.

[9] *See e.g., United States v. Giunta*, 925 F.2d 758, 767 (4th Cir. 1991), *overruled on other grounds sub nom. United States v. Burgos*, 94 F.3d 849 (4th Cir. 1996), *cert. denied*, 519 U.S. 1151 (1997); *United States v. Jones*, 765 F.2d 996, 1001 (11th Cir. 1985); *United States v. Melchor-Lopez*, 627 F.2d 886 (9th Cir. 1980).

v. United States, 483 U.S. 171, 175 (1987). There must be evidence that 1) there was a conspiracy, 2) that the declarant of the statements at issue and the defendant against whom the statements are offered were both members of this conspiracy, and 3) that the statements at issue were made 'during the course and in furtherance of the conspiracy.'" *See United States v.* Tellier, 83 F.3d 578, 580 (2d Cir.), *cert. denied*, 519 U.S. 955 (1996), *citing, Bourjaily*, 483 U.S. at 175-76.

The key to analyzing this issue is to keep in mind who it was the tapes were offered and admitted against at trial. They were offered as co-conspirator statements by Chilli (as interpreted by Lenehan) against Burt Kaplan. Accordingly, under the well settled authority cited above, for them to be properly admissible against Kaplan, there had to be independent proof that a conspiracy existed, that Kaplan and Chilli (as opposed to just Chilli and Lenehan - who, of course, could not be a co-conspirator as a government agent) were actually co-conspirators, and that these statements were made in the course and in furtherance of the conspiracy. At a minimum, these taped statements cannot possible satisfy the latter two requisite elements for admissibility under Rule 801(d)(2)(E).

First, there was no evidence at all, not even from Lenehan, that Burt Kaplan was the source of the marijuana. Just the opposite, Lenehan testified that when he actually went into the warehouse on the second visit with Chilli, Chilli and Kaplan went off together someplace and a "younger man" went with Lenehan and purportedly gave him the (nonexistent) box of marijuana.[10] Moreover,

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[10] At most, even if one were, *arguendo*, to credit all of the garbage Lenehan testified to, the strongest conclusion that could be drawn was that Kaplan was present at the warehouse (although not in the vicinity of the transaction) when the single marijuana transaction took place with someone else. It is well settled that "mere presence" does not subject one to criminal liability as a conspirator. *See e.g., United States v. Giraldo*, 80 F.3d 667, 673 (2d Cir.), *cert. denied*, 519 U.S. 847 (1996).

Lenehan earlier claimed that he went to the warehouse owned by Kaplan to see a man named "Butterball," who rented his own office space at the warehouse, in order to buy marijuana from him - not Kaplan. [Supplemental Appendix at 16][11]

Secondly, again even assuming *arguendo* that Lenehan's tale was true, at most he described a single transaction on a single occasion. The "single transaction rule" specifically addresses such a situation and makes clear that proof of a relationship on a single criminal occasion between an outsider and an alleged member of a conspiracy cannot substitute for the legally required independent proof of an agreement between the two sufficient to establish a conspiracy. *See e.g., United States v. Zabare*, 871 F.2d 282, 287 (2d Cir.), *cert. denied*, 493 U.S. 856 (1989). At best, Lenehan's testimony made out a single transaction between two people - no conspiracy, nor a transaction pursuant to a conspiracy.

Thirdly, and perhaps most importantly is a point most easily understood by focusing on the second set of statements that were admitted, those from the July 30, 1992, taped conversations. There is no conceivable way the taped statements could be deemed to be statements "in the course and furtherance of" any conspiracy. The admitted statements consisted of Chilli's talk to Lenehan of his "hopes" that perhaps some time in the future he could convince the "good guy," as a "favor" to sell some marijuana. [Supplemental Appendix at 24-25]. These were statements of their "hopes" for the possibility of some deal in the future, if their powers of persuasion were sufficient.

If anything, these statements alone prove that there was no conspiracy; rather the person about whom they were speaking (a person the government claimed was Mr. Kaplan)

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[11] Another government witness, Monica Galpine, the bitter and vindictive ex-wife of the co-defendant Thomas Galpine, acknowledged that "Butterball" had his own office space at the warehouse. [Supplemental Appendix at 17]

was someone who **could** provide them with marijuana, if they could successfully convince him to do so as a "favor." That does not reflect a meeting of the minds or any kind of agreement between the declarant and the object of their discussion; nor were such words "in the course and in furtherance of" any ongoing conspiracy between the declarant and the defendant. Consider the danger of permitting such a rule of admissibility, such that these kinds of statements of hope for some criminal conduct with another, not present and not a party to the conversation, can somehow be deemed to transform that "other" into a willing, knowing coconspirator. This is complete nonsense and completely unsupportable as a matter of law.

The statements admitted from the July 30, 1992, tapes (and specifically sought by the jury during deliberations) could never properly qualify as admissible under Rule 801(d)(2)(E), or on any other basis and their admission against Mr. Kaplan was reversible error that flies in the face of authority from virtually every other Circuit in the country. *See e.g., United States v. Melchor-Lopez*, 627 F.2d 886, 891 (9th Circuit 1980)(noting the danger in "overemphasiz[ing] a rule of evidence (that an agreement may be inferred from surrounding circumstances) at the expense of a rule of law (that proof of an agreement is required for the crime of conspiracy); *United States v. Jones*, 765 F.2d 996, 1003 (11th Cir. 1985)(the mere submission of proposals, incorporating pre-conditions, not met does not constitute a conspiracy - at least not with the one to whom a proposition will be proposed in the future). Here, there was neither evidence that Kaplan was willing to ever sell Chilli and/or Lenehan marijuana, if they wanted to buy more and, of course, there were no sales of marijuana at all after this conversation. *See also, United States v. Giunta*, 925 F.2d 758, 767 (4th Cir. 1991), *overruled on other grounds sub nom. United States v. Burgos*, 94 F.3d 849 (4th Cir. 1996), *cert. denied*, 519 U.S. 1151 (1997)("[I]t is important to note that proof that an alleged conspirator ... has assisted a willing

(ostensible) buyer ... in finding an ostensibly willing seller of drugs ... would not, standing alone, establish any agreement between the facilitator and the seller to do anything in concert with the drugs, including their importation and distribution.")

In this case, Chilli would have been less than an actual "facilitator", especially with respect to the July 30, 1992, conversation. At most he was one who hoped to be a facilitator for Lenehan and Lenehan's supposed customer if he could convince the person he had in mind to go along. Certainly, Chilli, the declarant, was not a coconspirator with anyone (except perhaps Lenehan if he had not been a government agent) as to his "hopes" and this was not in the "course" or "furtherance" of any ongoing conspiracy involving Mr. Kaplan.

Finally, in addition to the other bases for error in admitting these tapes, it was error for a cognizably different reason to allow into evidence the commentary on the tapes about the "righteous Jew", the past loan, etc. in order to try and prove some past relationship. This kind of talk constitutes mere "idle chatter" or a "narrative" account by one purported conspirator of another's purported past and in no way satisfies the requisite "in furtherance of" element of Rule 801(d)(2)(E). *See e.g., United States v. Gigante*, 166 F.3d 75, 83 (2d Cir. 1999); *United States v. Paone*, 782 F.2d 386, 390 (2d Cir.), *cert. denied*, 479 U.S. 682 (1986); *United States v. Heineman*, 801 F.2d 86, 95 (2d Cir. 1986), *cert. denied*, 479 U.S. 1094 (1987); *United States v. Birnbaum*, 337 F.2d 490, 495 (2d Cir. 1964).

Unfortunately, the lower court's decision on this issue is devoid of analysis; but suffice it to say that the statements admitted in this case, which were the focus of the jury's attention, and which severely prejudiced Mr. Kaplan did not satisfy even a single element of Rule 801(d)(2)(E), let alone every element, as required, and their admission constituted reversible error and error that is contrary to the law in virtually every other Circuit in the country.

III. THE PETITION SHOULD BE GRANTED BECAUSE THIS COURT SHOULD ESTABLISH THAT THE DOCTRINE OF NONMUTUAL COLLATERAL ESTOPPEL SHOULD BE APPLIED AGAINST THE GOVERNMENT IN THE CONTEXT OF A SENTENCING UNDER THE FEDERAL SENTENCING GUIDELINES WHERE THERE HAS BEEN A FULL AND FAIR OPPORTUNITY AND INCENTIVE IN A PREVIOUS RELATED CASE TO LITIGATE THE ISSUE

The government claimed at trial that one of Mr. Kaplan's primary "customers" in the marijuana business was one Fred Puglisi. Mr. Puglisi was himself tried and convicted on narcotics charges several years before Mr. Kaplan's trial.

At Mr. Kaplan's sentencing, the presentence report provided a drug weight for Mr. Kaplan's sentence of 48,000 pounds of marijuana [Appendix at 376] and the trial court adopted this. The figure was based exclusively on the testimony of the most disreputable witness, Molini. [Appendix at 382].[12]

At Puglisi's sentencing in this same judicial district, in a case prosecuted by this same prosecuting authority, his sentencing judge expressly found no more than a total of 4,000 pounds of marijuana had been distributed to him by his source. [Appendix 43-44]. These findings were adopted by

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[12] Molini held himself out as Puglisi's lieutenant, intimately knowledgeable about Puglisi's illegal activities.

the court on April 25, 1997.[13] The government, of course, had a full and fair opportunity to litigate the total amount of Kaplan's alleged distribution to Puglisi at Puglisi's sentencing, had every incentive to attribute as much marijuana as possible to him in that hotly contested case, and even had the opportunity to call Molini as its witness in that sentencing. Instead, it used another informant who apparently was not as "flexible" in his testimony as Mr. Molini; so he was less useful in the government's plan for Mr. Kaplan.

Inexplicably, at Mr. Kaplan's sentencing, the same prosecuting authority claimed that Mr. Kaplan was responsible for the possession and distribution of approximately 10 times the amount asserted at Puglisi's sentencing, or 48,000 pounds. This was based exclusively on claims by government witness Molini, as to what he had heard. Molini, of course, had been a government witness at the time of the Puglisi case (and in his debriefings in that case, never even mentioned Mr. Kaplan). The difference in amount between 5,000 pounds and 48,000 pounds came out to four full offense levels under the Federal Sentencing Guidelines. *See* Guidelines § 2D1.1 (Offense level of 36 rather than 32)

Mr. Kaplan argued that the government should be collaterally estopped from trying to attribute such an outrageous amount to Mr. Kaplan, given the position it had taken in the context of Mr. Puglisi's sentence, when it had both the opportunity and incentive to attribute as much marijuana as possible to Mr. Puglisi, and where it had taken the position that Puglisi accounted for eighty percent (80%)

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[13] Even accepting the presentence report's assumption that Puglisi accounted for eighty percent (80%) of the marijuana Messrs. Kaplan and Galpine allegedly possessed and distributed, rather basic arithmetic leads unalterably to the conclusion that even under the government's best theory, Messrs. Kaplan and Galpine possessed and distributed a total of 5,000 pounds of marijuana.

of Kaplan's business.[14] He asserted that the maximum amount the government should be permitted to attribute to him was 5,000 pounds, based on the doctrine of nonmutual collateral estoppel.[15]

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[14] Mr. Kaplan maintained all along that he wanted a hearing to challenge the government's factual assertions regarding the sentence to be imposed; however, minutes before his sentencing hearing was to start, his attorney came to him and told him that if he pressed forward and required a hearing on his own sentence, the government would seek to increase his co-defendant's sentence. He could not live with the idea of being responsible for that consequence and was given only minutes to consider the matter; so, on his lawyer's advice, he agreed to forego his hearing. He maintained his objections.

[15] The issue of whether nonmutual collateral estoppel should be applied in the context of a criminal sentencing has never been addressed by this Court. This Court has had occasion to consider the application of the doctrine in federal criminal cases and it has been accepted as an established doctrine. *See e.g., Ashe v. Swenson*, 397 U.S. 436, 443 (1970). This Court also has rejected its application to the issue of guilt or innocence in a criminal case, *see, e.g., Standefer v. United States*, 447 U.S. 10 (1980); however, for reasons to be discussed herein, the principles underlying *Standefer* and other cases in which the doctrine's application was rejected do not apply to a sentencing. Indeed, a federal sentencing is perfectly well suited to the doctrine's application, notwithstanding the analysis in *Standefer*.

At least two Circuits have flatly rejected the application of nonmutual collateral estoppel to criminal sentencing, *see, United States v. Velez-Soto*, 31 F.3d 1467 (9th Cir. 1994); *United States v. Montes*, 976 F.2d 235 (5th Cir. 1992); however, their decisions were based simply on the idea that the doctrine should not be applied to criminal cases in general, without carefully analyzing the matter specifically in the unique context of Guidelines sentencing.

The Sixth Circuit appears tacitly to have accepted the application of collateral estoppel in the context of sentencing, *see, e.g., United States v. Ross*, 778 F.Supp. 393, 401(S.D. Ohio 1991), *affirmed on other grounds sub nom. United States v. Holmes*, 961 F.2d 599 (6th Cir. 1992), *cert. denied*, 506 U.S. 881 (1992); however in a more recent unpublished opinion (not to be used for precedential value under 6th Circuit Local Rule 24), that Circuit rejected the doctrine's application in criminal cases. *See McCoy v. United States*, 1998 U.S. App. LEXIS 9703, *7 (6th Cir. May 11, 1998)(unpublished).

In *Parklane Hosiery Co, Inc. v. Shore*, 439 U.S. 322 (1979), this Court made clear that the doctrine of "collateral estoppel" does not require mutuality of parties. Under the previous "mutuality" doctrine, a judgment could not have collateral estoppel effect against any party unless that party actually had been a party litigant in the litigation from which the judgment at issue emanated. Nonmutual collateral estoppel is, by now, a well recognized doctrine designed to meet the dual purposes of "protecting litigants from the burden of relitigating an identical issue" with a party and of promoting "judicial economy" by avoiding needless litigation. *Id.* at 327.

There is every reason to apply the doctrine of nonmutual collateral estoppel in the instant case against the government, consistent both with the purposes of the doctrine and the relevant policy considerations this Court has identified. This Court has written that "[t]o preclude parties (like the government here) from contesting matters that they had a full and fair opportunity to litigate protects their adversaries from the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions." *Montana v. United States*, 440 U.S. 147, 153-54 (1979). As this Court has held, as long as the party against whom collateral estoppel (issue preclusion) is sought **had the opportunity and incentive** to litigate the first lawsuit fully and vigorously, and **there are no procedural opportunities available to the parties in the second action**

Similarly, while the Second Circuit rejected the application of the doctrine in the instant case in an unpublished Summary Order, in a later published decision it expressly left open the idea of its applicability to criminal sentencings. *See SEC v. Monarch Funding Corporation*, 192 F.3d 295, 306 (2d Cir. 1999)(declining the government's request to apply it in the case at bar, but expressly rejecting a blanket prohibition on the doctrine's application to criminal sentencings). *See also, M. Prusman, Ltd. v. Ariel Maritime Group, Inc.*, 781 F.Supp. 248, 250-52 (S.D.N.Y. 1991)(finding that fact-finding in sentencing has collateral estoppel effect).

that were unavailable in the first that might cause a different result, collateral estoppel applies. *Parklane Hosiery*, 439 U.S. at 332-33.[16]

Again, in the case at bar, the government clearly had every incentive on proving as much drug weight as possible against Puglisi at his sentencing and had the exact same procedural opportunities as were present in the instant case, including the ability to call Molini as a witness regarding the weight.

The concerns that have led this Court on occasion to reject the doctrine's application, as in *Standefer v. United States*, 447 U.S. 10 (1980), for example, simply are not present in the instant case.[17] In *Standefer*, this Court declined to apply collateral estoppel to bar the prosecution of a defendant as an aider and abettor, where the principal had been acquitted. The concerns leading to that decision, 1) that the rules of evidence limit the government's right to discovery during the criminal trial; 2) that the government has no right to appeal an acquittal; 3) that the government is

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[16] The Second Circuit's decision on this subject, of course, reflects virtually no analysis of the issue; however, it appears from this case and from other decisions from that Circuit, *see e.g., State of New York v. Julius Nasso Concrete Corp., et al.*, 2000 U.S. App. LEXIS 882 (2d Cir., January 25, 2000) that a more stringent test has been set up that focuses on whether the issue was actually litigated fully and vigorously in the initial case/forum, rather than simply on whether the **opportunity** for the same existed. Such a test runs afoul of both this Court's holdings, *e.g. Parklane Hosiery*, 439 U.S. at 332, and the purpose underlying the doctrine. That purpose would be undermined if the court actually had to evaluate the thoroughness and vigor with which the issue was litigated in the first forum. This is an erroneous standard.

[17] There are, of course, many noteworthy cases from courts around the country applying the doctrine against government agencies. *See e.g., NLRB v. Donna-Lee Sportswear Co, Inc.*, 836 F.2d 31 (1st Cir. 1987); *Colorado Springs Production Credit Assoc. v. Farm Credit Admin.*, 669 F.Supp. 1044 (D. Co. 1987). *See also, United States v. Stauffer Chemical Co.*, 464 U.S. 165, 170 (1984)(permitting defensive use of collateral estoppel against the government in favor of a party who prevailed in a prior action); *Montana, Supra.; Ashe, Supra.*

subject to the jury's whims; and 4) that applying the doctrine implicates the important federal interest in enforcing its criminal laws, *Standefer*, 447 U.S. at 22-25, do not apply in the context of a criminal sentencing. At sentencing, 1) the government is not limited by the rules of evidence or the type of evidence it can adduce; *see* 18 U.S.C. § 3661; Federal Sentencing Guidelines § 6A1.3; 2) the government is not a the jury's whim - the sentencing is exclusively by the judge; 3) the government has the right to appeal the sentence; *see* 18 U.S.C. § 3742; and 4) there is no federal interest in law enforcement that is undermined by applying collateral estoppel in sentencing.[18]

Indeed, the application of nonmutual collateral estoppel in the context of a federal criminal sentencing is exactly consonant with the central and overriding purpose in the enactment of the system of Guideline sentencing. *See* § 3 of the Guidelines Commentaries. The doctrine both in theory and in application ensures the kind of uniformity and public confidence in judicial decisions that the Guidelines were designed to foster. This case perfectly illustrates the point.

The lower court's flat rejection of the doctrine of nonmutual collateral estoppel in criminal cases is wrong, is against the policy underlying the doctrine, and is inconsistent with this Court's jurisprudence and decisions from other Circuits, as is its misunderstanding of the test to be applied to its application. This is an important issue which requires this Court's guidance. It is a question which this Court has not yet addressed.

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[18] A similar analysis addressing every factor identified by this Court as running against the application of the doctrine in *United States v. Mendoza*, 464 U.S. 154 (1984) readily distinguishes that case from the instant case and, again, leads to the conclusion that based on the policy considerations on which this Court has focused, the doctrine should be applied in full force to the sentencing context under the circumstances presented by the instant case.

CONCLUSION

For all of the foregoing reasons, because the decision below conflicts with this Court's jurisprudence and with decisions from other Circuit Court of Appeals, and because the questions and consequences involved are both serious and important, it is respectfully requested that the Writ of Certiorari be issued and that the conviction and sentence in this case be overturned, or at least that the case be remanded for resentencing with directions to apply the doctrine of nonmutual collateral estoppel to Mr. Kaplan's sentencing.

Respectfully Submitted,

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United States of America, Appellee v. Thomas Galpine, aka 1-95-m-1647-01 and Burton Kaplan, Appellants.

98-1059(L), 98-1074

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

1999 U.S. App. LEXIS 19611

June 11, 1999, Decided
June 11, 1999, Entered

PRIOR HISTORY: Appeal from the United States District Court for the Eastern District of New York (Amon, J.).

DISPOSITION: AFFIRMED.

COUNSEL: APPEARING FOR APPELLANT THOMAS GALPINE: Marc A. Fernich, New York, NY.

APPEARING FOR APPELLANT BURTON KAPLAN: Judd Burstein, New York, NY.

APPEARING FOR APPELLEE UNITED STATES OF AMERICA: Sung Hee Suh, Judith Lieb, Assistant United States Attorneys, Eastern District of New York.

JUDGES: PRESENT: Honorable Pierre N. Leval, Honorable Robert D. Sack, Circuit Judges. Honorable James B. Moran, District Judge.

OPINION:

SUMMARY ORDER

Burton Kaplan (Kaplan) appeals from a judgment of conviction and a sentence of 324 months, and Thomas Galpine (Galpine) appeals from a judgment of conviction and a sentence of 192 months, entered by the United States District Court for the Eastern District of New York on January 9, 1998 following a jury trial. Both defendants were convicted of the following: 1) One count of conspiring to distribute and possessing marijuana with the intent to distribute in violation of [*2] *21 U.S.C. §§ 841*(b)(1)(A), 846; 2) One count of distributing and possessing marijuana with the intent to distribute in violation of *21 U.S.C. § 841*(a)(1) and (b)(1)(A); 3) Two counts of filing false income tax returns in violation of *26 U.S.C. § 7206*(1).

The evidence presented at trial established that during 1991 and until September of 1992, Galpine and Kaplan were engaged in a large-scale marijuana trafficking operation in Brooklyn and Staten Island which operated primarily out of a Staten Island warehouse owned by Kaplan and used for his legitimate wholesale clothing business (the Kaplan/Galpine organization). The evidence presented included: testimony by government informant David August, pursuant to a cooperation agreement, that he had received marijuana from Galpine directly and made purchases from the Kaplan/Galpine organization through another individual; testimony by informant Steve Lenehan, pursuant to a cooperation agreement, that he had obtained marijuana from Kaplan's warehouse in the company of Gerald Chilli; testimony by informant Robert Molini, pursuant to cooperation agreements, that Kaplan and Galpine [*3] sold large shipments of marijuana to a criminal organization headed by Frederick Puglisi; videotape and photographs taken by the New York Police Department of various activities that took place outside of the warehouse; three audiotaped recordings of Steve Lenehan meeting with Gerald

Chilli on which Chilli detailed Kaplan and Galpine's marijuana distribution business; testimony by Galpine's estranged wife, Monica Galpine, pursuant to a cooperation agreement, about her involvement in the Kaplan/Galpine organization; marijuana seized from Robert Molini's residence; records of marijuana purchases from the Kaplan/Galpine organization seized from Frederick Puglisi's residence; and drug paraphernalia from various sources.

On appeal, Kaplan argues that 1)the trial court erred in refusing to permit him to present his theory of the case at trial; 2) the court should have ruled certain surveillance audiotapes inadmissible; 3) the court violated *18 U.S.C. 201*(c)(2), which prohibits anyone from giving a witness an incentive to testify, by permitting cooperating witnesses to testify after they had entered into cooperation agreements; 4) the jury was unfairly influenced by [*4] pre-trial publicity; 5) at sentencing the court relied on the wrong base sentencing level; 6) the evidence presented at trial did not conform with, and thus constructively amended, the indictment; and 7) the court erred in instructing the jury on reasonable doubt. Galpine adopts these claims and further argues that: 1) the judge should have directed a mistrial because David August's' testimony violated the court's in limine ruling prohibiting testimony about heroin-related activity; 2) the judge erred in permitting Kaplan's attorney to cross-examine Galpine's ex-wife about her motives to testify, because her comments impugned Galpine's character; and 3)the judge erred in determining that the issue of "materiality" in tax code violations is a question of law.

For the following reasons, we find each of these arguments meritless and affirm the decision of the court below.

Kaplan first argues that he was deprived of the right to present his theory of defense when the district court, relying on Federal Rule of Evidence 403, ruled in limine that Kaplan could not present evidence about the government's

motive in bringing the case. Kaplan wanted to argue that the government had manufactured [*5] the case against him by suborning the perjury of the witnesses testifying against him for the purpose of forcing Kaplan to become a cooperating witness in other drug-related cases so that he could corroborate the testimony of another witness in those cases, Anthony Casso. The district court properly rejected this evidence. Although the defense is entitled to present its theory of defense, courts should not allow the introduction of a theory for which there is no factual support. See, e.g. *United States v. Corso, 20 F.3d 521, 528 (2d Cir. 1994).* The only evidence Kaplan presented in support of the "Casso defense" were two memorandums indicating that the government had considered offering Kaplan a cooperation agreement, hardly an indication that the government framed Kaplan to force his cooperation. Moreover, as the district court observed, under Rule 403 the de minimis probative value in admitting Kaplan's factually unsupported theory was substantially outweighed by the likelihood that the jury would be confused by its speculative and convoluted nature.

Kaplan next argues that the district court erred in admitting the taped conversations between government informant Steven [*6] Lenehan and Kaplan/Galpine marijuana client Gerald Chilli under Federal Rule of Evidence 801(d)(2)(E), which makes an exception to the hearsay exclusionary rule for statements made by co-conspirators. Kaplan argues that Rule 801 was inapplicable because the government did not prove that Chilli and Kaplan were coconspirators. As the district court concluded, however, a review of the audiotape transcripts and Lenehan's testimony indicates that Chilli was familiar with the scope of the Kaplan/Galpine organization's business activities and at a minimum conspired with Kaplan and Galpine to purchase marijuana. Moreover, the taped statements contemplated present and future drug purchases and were consequently in furtherance of the conspiracy. The material was thus properly

admitted under Rule 801(d)(2)(E). For similar reasons, we reject Kaplan's argument Chilli should not be considered a coconspirator under the "single transaction rule," under which an outsider who is merely present at a single conspiratorial incident will not be considered a coconspirator unless the evidence establishes that he had knowledge of the conspiracy and intended to join. *United States v. Miranda-Ortiz, 926 F.2d 172, 176* [*7] (2d Cir.) cert. denied *502 U.S. 928 (1991).*

We also find meritless Kaplan's argument that the witness gratuity statute prevents the prosecution from offering leniency. He relies on the Tenth Circuit's now-invalid holding in *United States v. Singleton, 144 F.3d 1343 (1998)* superseded by *165 F.3d 1297 (10th Cir. 1999),* which has not been adopted by the Second Circuit and is contrary to the current law in every circuit. Nor is there any support for his argument that the district court failed to protect the jury from pre-trial publicity. Only two alternate jurors had even seen pre-trial articles about the case, and both were excused by the judge despite the fact that neither had actually read the material. We also disagree with Kaplan's argument that because in a previous trial Frederick Puglisi had been sentenced for purchasing 4,000 pounds of marijuana from Kaplan's organization, the court was collaterally estopped at Kaplan's sentencing from finding that he had sold Puglisi a larger quantity. Nonmutual collateral estoppel does not apply in criminal cases, *United States v. Ustica, 847 F.2d 42, 49 (2d Cir. 1988),* and, even if the doctrine [*8] were to apply, Kaplan failed to show that the issue was fully and fairly litigated at the Puglisi sentencing. We find the rest of Kaplan's arguments similarly unavailing and turn to Galpine's arguments.

Galpine first claims that David August's reference to Tommy Galpine's involvement with heroin warranted a mistrial. We acknowledge that the district court had excluded in limine any reference to heroin, but disagree that a mistrial

was warranted because the comment was fleeting, the judge immediately took steps to cure and considered the mistrial issue at length, and there was ample other evidence that could have served as a basis for conviction. See *United States v. Perez, 144 F.3d 204, 210 (2d Cir. 1998).* Galpine also argues that Monica Galpine's testimony about Galpine's drug use and physical treatment of their children, elicited on cross examination by Kaplan's attorney for impeachment purposes, impermissibly biased the jury. However, Galpine's failure to object to this testimony at trial prevents him from raising the issue on appeal. Galpine's other arguments are similarly unsupported.

ON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the judgment of the District Court be and it hereby is AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

KAREN GREVE MILTON
ACTING CLERK

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 14th day of October, one thousand nine hundred and ninety-nine.

USA,
Appellee,

v Dkt No.: (98-1055(L)), 1074

Burton Kaplan,
Defendant - Appellant.

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the appellant Burton Kaplan.

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED.**

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT

KAREN GREVE MILTON,
Acting Clerk

/s/ Beth J. Meador
Beth J. Meador,
Administrative Attorney